# KTL Sdn Bhd v Azrahi Hotels Sdn Bhd (formerly known as Virtual Amber Sdn Bhd); Advance Hotels Supplies (M) Sdn Bhd & Anor, supporting creditors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D1–28–939 OF 2001
VINCENT NG J
20 MARCH 2003

***Companies and Corporations*** — *Winding up — Stay of order — 'Unless order' granted to allow respondent time to settle debt — Petitioner's application to wind up the respondent allowed — Respondent applied for stay pending appeal — Whether stay under s 253 of the Companies Act 1965 pending appeal should be granted — Whether there was exceptional circumstances meriting stay — Companies Act 1965 s 253*

The petitioner by his petition sought an order to wind up the respondent for a debt. The respondent requested for an adjournment for the purpose to effect a settlement and also because counsel for the respondent was involved in a car accident. By consent of both parties, the court adjourned the matter and subsequently, the respondent's solicitor informed the court of the prospective sale of the respondent's hotel. The second supporting creditor suggested the respondent be given an opportunity to resolve the matter, failing which the winding up order be made. Hence, where there was a request for time to settle the amount claimed, the High Court judge agreed to stand the petition and granted an 'unless order'. When the matter was listed again, the respondent asked for a further two months to complete the sale of the hotel. Counsel for the petitioner pointed out that the court had actually granted the respondent more than the time requested to resolve the matter and it was for precisely this reason that the respondent had consented to the 'unless order'. He urged the court to make the winding up order as provided for in the 'unless order'. Subsequently, the respondent filed an application for stay of the winding up order pending its application to the Court of Appeal for leave to appeal against the decision of the High Court judge. The issue for determination was whether the application by the respondent for a stay under s 253 of the Companies Act 1965 pending appeal should be granted.

**Held,** allowing the petitioner's application to wind up the respondent and refusing the stay:

(1) An 'unless order' (dated 26 February 2002, in the instant case) is tantamount to an agreement; that in consideration of the time given to the respondent to pay, the respondent will not contest the petition. This court foreshadowed the order that it proposed to make and stood over the proceedings to 15 April 2002. The intention not to contest was further confirmed by the fact that the respondent did not resist the petition on the date of hearing. The very fact that the respondent sought time to sell off its hotel was

an acknowledgment that it was unable to pay its debts unless it was given time to wind up its property holdings. Pursuant to the 'unless order', the High Court judge allowed the petitioner's application to wind up the respondent. Further, the High Court judge appointed one Mr SK Tee as the liquidator of the company and directed that the costs of the petition be paid out of the company's assets (see p 509D–G).

(2) A stay under s 253 of the Companies Act 1965 pending appeal should be granted only in very exceptional circumstances, where the winding up order made is patently wrong in law (for example, the judge being clearly amiss on the law) or on fact, or was made in circumstances which has clearly occasioned a substantial miscarriage of justice. In general, an order to wind up a company will not be stayed pending an appeal. It was beyond question that the respondent in the instant case did not even attempt to show such exceptional circumstances, and thus, the High Court judge refused the stay (see pp 509I–510A, D–E).

**[Bahasa Malaysia summary**

Pempetisyen melalui petisyen beliau telah memohon satu perintah untuk menggulung responden atas suatu hutang. Responden memohon satu penangguhan bagi tujuan mendapat satu penyelesaian dan juga kerana peguam bagi pihak responden terlibat dalam satu kemalangan kereta. Melalui persetujuan kedua-dua pihak, mahkamah telah menangguhkan perkara tersebut dan berikutan itu, peguamcara responden telah memaklumkan kepada mahkamah tentang jualan yang bakal dibuat ke atas hotel responden. Si piutang sokongan mencadangkan responden diberi peluang untuk menyelesaikan perkara tersebut, dan jika gagal satu perintah penggulungan akan dibuat. Justeru itu, di mana terdapat satu permintaan untuk masa bagi menyelesaikan jumlah yang dituntut, hakim Mahkamah Tinggi telah bersetuju untuk menangguhkan petisyen tersebut dan membenarkan satu 'unless order'. Apabila perkara tersebut disenaraikan sekali lagi, responden telah meminta dua bulan lagi untuk menyelesaikan jualan hotel tersebut. Peguam bagi pihak pempetisyen menegaskan bahawa mahkamah sebenarnya telah memberikan responden lebih daripada masa yang diminta untuk menyelesaikan perkara tersebut dan untuk sebab itulah responden telah bersetuju dengan 'unless order' tersebut. Beliau mendesak mahkamah untuk membuat perintah penggulungan sebagaimana yang diperuntukkan dalam 'unless order' tersebut. Berikutan itu, responden telah memfailkan satu permohonan untuk penggantungan perintah penggulungan tersebut sementara menunggu rayuan ke Mahkamah Rayuan terhadap keputusan hakim Mahkamah Tinggi tersebut. Persoalan untuk ditentukan adalah sama ada permohonan oleh responden untuk satu penggantungan di bawah s 253 of the Companies Act 1965 sementara menunggu rayuan patut dibenarkan.

**Diputuskan,** membenarkan permohonan pempetisyen untuk menggulung responden dan menolak penggantungan tersebut:

(1) Satu 'unless order' (bertarikh 26 Februari 2002, dalam kes semasa) sama seperti satu perjanjian; di mana sebagai balasan masa yang diberikan kepada responden untuk membayar, responden tidak akan mempertikaikan petisyen tersebut. Mahkamah ini telah membayangkan perintah yang ia berhasrat untuk buat dan menangguhkan prosiding ke 15 April 2002. Hasrat untuk tidak mempertikaikan seterusnya telah disahkan oleh hakikat bahawa responden tidak menentang petisyen tersebut pada hari perbicaraan. Hakikat bahawa responden telah memohon masa untuk menjual hotelnya adalah pengakuan bahawa ia tidak mampu membayar hutangnya kecuali jika ia diberi masa untuk menggulungkan hartanahnya. Menurut 'unless order', hakim Mahkamah Tinggi telah membenarkan permohonan pempetisyen untuk menggulungkan responden. Tambahan pula, hakim Mahkamah Tinggi telah melantik Mr SK Tee sebagai penyelesai syarikat dan mengarahkan kos petisyen dibayar dari aset-aset syarikat tersebut (lihat ms 509D–G).

(2) Satu penggantungan di bawah s 253 Akta Syarikat 1965 sementara menunggu rayuan hanya patut dibenarkan dalam keadaan yang tertentu, di mana satu perintah penggulungan dibuat dengan nyata salah di sisi undang-undang (contohnya, hakim dengan jelas terkhilaf dalam undang-undang) atau atas fakta, atau dibuat dalam keadaan di mana dengan jelas menyebabkan ketidakadilan yang substantif. Secara am, satu perintah untuk menggulungkan satu syarikat tidak akan digantung sementara menunggu satu rayuan. Adalah tidak dipersoalkan sama sekali bahawa responden dalam kes semasa tidak mencuba untuk menunjukkan keadaan tertentu sedemikian, dan oleh itu, hakim Mahkamah Tinggi menolak penggantungan tersebut (lihat ms 509I–510A, D–E).]

**Notes**

For cases on stay of order, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1118–1122.

**Cases referred to**

*A & BC Chewing Gum Ltd Topps Chewing Gum Inc, Re v Coakley & Ors* [1975] 1 All ER 1017 (refd)

*Building Societies' Trust Ltd, Re* (1890) 44 Ch D 140 (refd)

*European Banking Co, Re, ex p Baylis* (1866) LR 2 Eq 521 (refd)

*Corporate Affairs Commission (NSW) v Austral Oil Estates Ltd (No 2)* (1986) 10 ACLR 354 (refd)

*IOC Australia Pty Ltd v Mobil Oil Australia Ltd* (1975) 49 ALJR 167 (refd)

*Mittagong RSL Club Ltd and the Companies Act, Re* [1980] 4 ACLR 897 (refd) A

*Norton Iron Company, Re* (1877) 47 LJ Ch 9 (refd)

*Orleans Marketing Co Pty Ltd, The v Neydharting Moor (Aust) Pty Ltd* (1985) 3 ACLC 147 (refd)

*Roma Industries Pty Ltd, Re* [1976] 1 ACLR 296 (refd) B

**Legislation referred to**

Companies Act 1965 ss 218, 243, 253

Companies (Winding Up) Rules 1972 r 32

Winding Up Rules 1972 r 30 C

*SS Tieh* (*Paul Ong & Assoc*) for petitioner.

*R Ledchumiah* (*Ramamoorthy Ledchumiah & Co*) for respondent.

*Alex Chang* (*Alex Chang & Co*) for supporting creditor, Advance Hotels Supplies (M) Sdn Bhd.

*BC Tee* (*Sa'adiah, Khoo, Lo & Co*) for supporting creditor, King Koil Corp (M) Sdn Bhd. D

**Vincent Ng J**: The petitioner by his petition presented on 2 October 2001, sought an order to wind up the respondent for a debt amounting to RM101,987.54. A statutory notice of demand dated 28 August 2001 had been duly served upon the respondent and had not been complied with. E

In the light of the superseding developments, it is unnecessary to go into the facts of this case in detail. Suffice to say, the respondent opposed the petition and had by the first hearing on 21 January 2002 filed their affidavit in reply. The registrar's certificate had been issued on 11 January 2002, certifying that the petitioner had complied with the requirements of r 32 Companies (Winding Up) Rules 1972. F

The superseding developments referred to above, started as early as 31 January 2002, wherein Encik Azman bin Dawood, the project manager for the respondent who was present, requested for an adjournment for the purpose to effect a settlement and also because counsel for the respondent, Mr Puspanathan was involved in a car accident. This was confirmed by Mr SS Tieh, who appeared for the petitioner, that there was a possibility of a settlement. Accordingly, with the consent of parties present, the court adjourned the matter to 26 February 2002. G

On 26 February 2002, Mr Puspanathan, the respondent's solicitor, enlarged upon the efforts towards settlement, informing the court of the prospective sale of the respondent's single realty, the Seremban Hilton Hotel. He anticipated the execution of the sale and purchase agreement by the end of March and therefore asked for date in early April 2002. H

Mr Alex Chang, who appeared for the second supporting creditor, suggested that the respondent be given an opportunity to resolve the matter, failing which the winding up order be made. In all fairness, he suggested a later dated, sometime in mid-April 2002. His suggestion was enthusiastically received by Mr Puspanathan. I

I had of course, by this time, had the benefit of reading not only the cause papers but also the lengthy submissions prepared by parties for and against the winding up of the respondent. I was minded to grant the winding up order, as I was entirely satisfied that the respondent's case was without merit on law or fact. Clearly, there was no real or bona fide dispute that the debt was due to the petitioner and that the respondent was unable to pay its debts æ within the meaning of s 218 of Companies Act 1965 ('the Act'). Indeed, the essential focus of its case is that it needs time to sell its hotel to enable it to pay the respondent. This request for time to sell the very core of its assets ipso facto shows that the respondent was insolvent; and no attempt was made to persuade this court otherwise, as to its solvency. In any event, my view is that, actual solvency of a respondent company in a winding up application is only relevant to establish the presence of a real dispute as to the debt, since the company is deemed to be insolvent upon failure to pay a sufficiently established debt in accordance with the s 218 notice. In the above circumstances, the petitioner is entitled to a winding up order ex debito justitiae (see *IOC Australia Pty Ltd v Mobil Oil Australia Ltd* (1975) 49 ALJR 176) though even then the court's discretion, in appropriate cases, to grant grace to settle should be untrammelled. Also, in *The Orleans Marketing Co Pty Ltd v Neydharting Moor (Aust) Pty Ltd* [1985] 3 ACLC 147, Helsham CJ had this to say, at p 153:

> The submissions made to Master on 1 November 1984 and to me on behalf of the plaintiff were to the effect that having found, as he did, that there was no dispute on substantial grounds as to the plaintiff's claim the Master was bound to make a winding-up order. There being no such dispute, and the plaintiff being unable to have its debt paid, it was entitled ex debito justitiae to have a winding up order made. Where in the absence of any real dispute as to the debt, the failure by a company to pay in accordance with a valid s 364 notice results in there being a deemed insolvency of the company, then the question of its actual solvency is not relevant. The general rule is that the company will be wound up, and there is no reason why a creditor whose debt is not in dispute should be sent off to sue for it in another court. There is no reason why the general rule should not be applied in this case. So run the submissions. The submissions are valid. ... But the undisputed evidence was that the defendant was solvent, ... there was a genuine dispute about the claim, ...

Notwithstanding the aforesaid, yet bearing in mind what I thought was the imminent resolution of the matter, I agreed to stand the petition over till 15 April 2002 and recorded an order which was extracted by the supporting creditor in the following terms:

> IT IS HEREBY ORDERED *by consent that unless the above matter is settled on or before 15 April 2002* between your petitioner, the supporting creditors and the respondent, *a companies winding up order shall be made against the respondent on that date.* (Emphasis added.)

The 'unless order' is not a new creature. Australian cases where such orders are made are legion. The rationale underpinning this approach is both compelling and highly persuasive. Modern day courts, in this new era of

rapid development, are lumbered with an ever-increasing backlog of cases. Encompassed within this truism are cases where the clearly manifest intention of a defendant or respondent in a proceeding is to secure time to settle rather than to contest the matter, though he may also have filed rebuttal papers as a matter of formality. A court is naturally impelled to obviate unnecessary expenditure of its time entailed in managing and adjudicating upon a matter bereft of a serious intention on the part of the defendant or respondent to join battle. Obviously, in such situations, if the intention is to do battle, armed with cogent or even arguable grounds, the predominant focus would not be to request for time to settle the amount claimed æ as in the current case where, indeed, the respondent was given more time than it requested. Thus, in the interests of justice and good grace a defendant's or respondent's request for an adjournment of the hearing to another date to settle the matter amicably ought to be allowed; but allowed on terms such that the court's time is not wasted in permitting the latter party to renege on his promise to settle, especially after being given reasonable time æ nay, such time as requested æ to settle. This is how the concept of 'unless orders' took root in jurisprudence. To illustrate this concept I need do no more than quote the illuminating dicta of learned judges in cases as follows. In *Re Mittagong RSL Club Ltd and the Companies Act* [1980] 4 ACLR 897, Master Cohen QC expressed the following views:

> I am of the view that the company may well have believed that for some vague and unsubstantiated reason it was entitled not to pay the moneys due to the petitioner. I do not consider that that right has in fact been substantiated but I consider that in the circumstances I should exercise the discretion given to the court and not order that the company be wound up until it has had a further opportunity to pay the debt due to the petitioner. Accordingly it is my intention to adjourn this petition for a period of 14 days. If on the adjourned date the debt has not been paid then I consider that I would be justified in order that the company be wound up, this failure being a matter which the court could take into consideration on the question of whether the company is able to pay its debts.

and decided thus:

> Petition is stood over to 26 March 1980.
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> Accordingly, I consider that the standing over of the making of any order be subject to the condition that within 14 days from today the company pay into court the sum of $10,194.06. If on the adjourned day that money has been paid as directed the petition will be dismissed. If it be not paid then I shall make an order that the company be wound up.

Also, in *Corporate Affairs Commission (NSW) v Austral Oil Estates Ltd (No 2)* (1986) 10 ACLR 354, Young J decided, at p 358:

> ... I commenced hearing it on Monday and yesterday, having tentatively reached the conclusion that the company should be wound up unless a scheme of arrangement could be proposed, on the application of the company I stood over the summons to 27 March to give time for a scheme of arrangement to be formulated.

In another Australian case, *Re Roma Industries Pty Ltd* [1976] 1 ACLR 296 Supreme Court of New South Wales, Bowen CJ made the following proposal:

> ... I am disposed, without making a winding up order at this time, to stand the matter over for fourteen days to enable the parties to consider the possibility of arriving at some interim arrangement. ... When the matter is listed before me again after the expiry of 14 days if the parties have not reached agreement I would propose to make a winding up order, and also an order for payment of the Commissioner's costs out of the assets of the company.

When the matter was listed again before me on 15 April 2002, Mr Letchumiah, who appeared for the respondent, asked for a further two months to complete the sale of the hotel. He, however, conceded that it was at the respondent's specific request that the matter was adjourned to April 2002 and that the respondent had consented to the 'unless order' that was made on 26 February 2002.

Mr SS Tieh, for the petitioner, was quick to point out that the court had actually granted the respondent more than the time they had requested for to resolve the matter and it was for precisely this reason that the respondent had consented to the 'unless order'. He urged the court to make the winding up order as provided for in the 'unless order'.

An 'unless order' is akin to other orders made *nisi*. *Nisi* is a Norman-French word which means 'unless'. It stands to reason that an 'unless order' (dated 26 February 2002, in the instant case) is tantamount to an agreement; that in consideration of the time given to the respondent to pay, the respondent will not contest the petition. This court foreshadowed the order that it proposed to make and stood over the proceedings to 15 April 2002. The intention not to contest is further confirmed by the fact that the respondent did not resist the petition on the date of hearing. In any event, the 'unless order' which was made with consent of the respondent has the effect of superseding the affidavit in opposition filed under r 30 of the Winding Up Rules 1972. And the very fact that the respondent sought time to sell off its hotel is an acknowledgment that it is unable to pay its debts unless it is given time to wind up its property holdings. So, pursuant to the 'unless order', I allowed the petitioner's application to wind up the respondent. Further, I appointed one Mr SK Tee as the liquidator of the company and directed that the costs of the petition be paid out of the company's assets.

About three and a half months later, on 22 July 2002 (vide encl 47, prayer 4) the respondent filed an application for stay of the winding up order pending its application to the Court of Appeal for leave to appeal against my decision. It is important to note that this was an application by the respondent for a stay under s 253 and not an application by the liquidator or creditor or contributory under s 243 of the Act, where we have a welter of case authorities. Notably, prayer 4 of encl 47 was for a common law stay, which this statutory court is empowered to entertain under s 253 of the Act, and this stay is distinct from the other specie of stay provided under s 243 of the Act, more commonly described as a statutory or

permanent stay, which only the liquidator or creditor or contributory of the company may apply. In considering an application for stay under s 253 it is illuminating to bear in mind the dicta of Plowman J in *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley & Ors* [1975] 1 All ER 1017 who had this to say:

> As I understand it, the position is this. First of all, as a matter of jurisdiction it is quite clear that I have jurisdiction to grant a stay, because the Companies Act 1948 says so. It says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then there is the question of practice, and as a matter of practice a stay is never granted. The only exception that I think is known to the Department of Trade is where I myself once went wrong in the Westbourne Galleries' case [*Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492], and not having been alerted to the position, and not knowing it before, I granted a stay, with precisely what consequences nobody has ever told me. But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding up order has been made the official receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of s 227 of the 1948 Act; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.
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> Supposing there is an appeal and the winding up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered; it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, really no additional harm has been done once the winding up order has been made by refusing a stay. As I understand it, if the official receiver is given an indemnity, say by the Coakley brothers, who are running this business, he will allow it to be carried on, and the Coakley brothers, in this case, could be appointed special managers and carry on the business as they have been doing. If the business is being carried on at a profit, creditors of the business, after the date of the winding up order, would be paid in priority to the unsecured creditors at the date of the order as part of the expenses of the winding up. Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss. Of course, if the business can only be carried on at a loss æ it should not be carried on at a loss obviously.
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> Those, I think, are really the reasons why, in practice, a stay is not granted æ a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, of course, cadit quaestio.

Though I agree with the practical rationale of the above views, as it accords entirely with realism, and I would salute Plowman J for the rare display of candor in his judgment, yet I must state that it is, in my judgment, beyond argument that a company which has been ordered to be wound up has the right to appeal against such an order and to make any and all applications incidental to the appeal, including an application for a stay of the winding up order. But, I must however add the caveat, that for the practical reasons advanced by Plowman J, a stay under s 253 pending appeal should be

granted only in very exceptional circumstances, where the winding up order made is patently wrong in law (for example, the judge being clearly amiss on the law) or on fact, or was made in circumstances which has clearly occasioned a substantial miscarriage of justice.

I am embolden in holding this view, as there may be more than one winding up petition though only one winding up order may be made. It may be of interest to know that where two or more petitions are presented for a winding up order, they take priority according to their dates of advertisement and not according to their dates of presentation. And, another creditor, who chooses to present a second petition does so at his own risk as to costs. Thus, if the first petition is bona fide, then the second petition is dismissed with costs (see *Re Building Societies' Trust Ltd* (1890) 44 Ch D 140; *Re Norton Iron Company* (1877) 47 LJ Ch 9; and *Re European Banking Co, ex p Baylis* (1866) LR 2 Eq 521). A further practical impediment to granting stay, which I have also to bear in mind, is that if a stay pending appeal is allowed bereft of any exceptional circumstances shown and the same directors and managers, who have brought about the subject company's dire financial straits, are de facto reinstated to run the company, the winding up order already made would debar the filing of any further winding up petitions even for future debts until the appeal is decided, which may be several years hence. The consequence could be that, during the interim period these same directors would run the company with impunity causing serious prejudice to other creditors. Thus, in general, an order to wind up a company will not be stayed pending an appeal. It is beyond question that the respondent in the instant case did not even attempt to show such exceptional circumstances, and I refused the stay. Indeed, the application before me for stay was filed on 22 July 2002, that is, over three months after the liquidator had taken over and had gone full steam to manage the respondent's affairs. Subsequently, I was informed that leave to appeal and stay was granted by the Court of Appeal subject to certain conditions.

*Petitioner's application to wind up the respondent allowed and stay refused.*

Reported by Peter Ling